LAKE COUNTY BOARD of ADJUSTMENT
May 11, 2016
Lake County Courthouse Commissioners Office (Rm 211)
Meeting Minutes

MEMBERS PRESENT: Frank Mutch, Steve Rosso, Don Patterson, Merle Parise

STAFF PRESENT: LaDana Hintz, Robert Costa, Jacob Feistner, Lita Fonda, Wally Congdon (4:28 pm)

Frank Mutch called the meeting to order at 4:02 pm. **Meeting minutes deferred, per agenda.**

BLANKENSHIP SETBACK VARIANCE—MASUMOLA (4:03pm)
Jacob Feistner introduced Ken Smith, the agent for the project and presented the staff report. (See attachments to minutes in the May 2016 meeting file for staff report.) He referred to two handouts to the Board that Ken provided yesterday, which included the stormwater plan.

Ken Smith thought Jacob had done a good job of covering things. Steve had questions for Ken and Jacob. Ken confirmed the stormwater management plan would handle the amount of water that had been calculated. On pg. 14, condition #9, Jacob clarified there would not be a patio under the deck and Ken said it would remain grass. Jacob explained there was a typo in #9. It was just a deck. Ken confirmed the deck had a non-permeable surface and that there was no additional vegetation plan beyond the existing vegetation, with grass to the lake. Jacob added they weren't losing vegetation.

On pg. 12, for finding of fact #5, Steve suggested inserting wording after the first sentence that would say, "Limiting the new deck to a width of 6 feet would alleviate the need for a variance. However a 6-foot x 20-foot deck is too small to allow for reasonable use. A 14-foot by 20-foot deck as proposed would allow reasonable use and provide the minimum relief from the regulations." This would cover the question of whether a smaller deck had been considered if someone looked at this in the future. He also suggested deleting 'occur' at the end of condition #6 on pg. 13.

Public comment opened: None offered. *Public comment closed.*

Motion made by Steve Rosso, and seconded by Don Patterson, to approve the variance, conditions and findings of fact as modified. Motion carried, all in favor.

D & H HOLDINGS VARIANCE—FINLEY POINT (4:15 pm)
Jacob Feistner introduced Craig Dulmes, the agent for the project, and presented the staff report. (See attachments to minutes in the May 2016 meeting file for staff report.) He modified numbers given in the first paragraph of the report to reflect a 2-foot eave. The original numbers were based on the submitted site plan. He hadn't realized the structure in attachment 3 showed the footprint but not the eaves. The proposed setback was for 10

feet from the property line, which included about 48 square feet within the setback. Steve commented that the way the building was configured with respect to the property line, the 2-foot eave protruded at an angle. The corner probably extended more than 2 feet because of the diagonal distance. Should they say 9 feet to avoid future problems? Jacob replied that Robert measured it on site and thought it was around 10 feet. Robert asked Craig if he had an estimate of what that would be. Craig thought it would be around 3 inches. There were no rain gutters. He confirmed there was a drip edge and the fascia would be out 2 feet. Jacob thought they could say 'approximately 10 feet'.

Craig Dulmes said when they originally started to dig into the hill for a foundation, the washed rock gravel kept coming down. They began to encroach heavily into the driveway. He and David Graham decided they better not take more of the hillside, which was beginning to roll. The owner was under the impression he could put the building where the existing one was. The existing one was a lot smaller. He didn't think the owner knew his corner was getting out that far. He didn't have a place to move closer to the lake because they would encroach upon another hillside.

Craig confirmed for Steve that the steep sloped area with arrows (SE corner) on attachment 3 was the approved location. The driveway was right above that. The retaining wall shown on the attachment was new, and the foundation had a 4-foot frost wall. It had a footing, frost wall and a slab inside.

On pg. 16, in D, Steve suggested that after "…the existing development," adding a new sentence like, "Requiring the structure to be demolished and rebuilt, or moved outside the setback would create more construction impacts adversely affecting the environment, neighboring properties and the public." They could require it to be moved 6 to 7 feet but that might not be justified by the impacts created by the move. He wondered if this should be added to F on pg. 17, as F.IX. They could say something like, "Not granting the variance will require the development to be demolished and rebuilt or moved outside the setback, and that would create more construction impacts adversely affecting the environment, neighboring properties and the public." On pg. 17, G. could also have wording like that, following "substantially less impact to neighboring properties," with "the environment and the public, then requiring the structure to be demolished and rebuilt or moved outside the setback." On pg. 19 in #6 at the end of the sentence, 'occur' could be deleted.

Jacob noted in condition #9 on pg. 19, it should read 'garage' rather than 'patio, deck, and covered deck'. The numbers in #1 needed to change to reflect the new findings, so 16 square feet changed to approximately +/- 48 square feet and 12 feet changed to +/- 10 feet. Places where this needed to change also included the introductory paragraph on pg. 13 and scattered throughout the report. Anywhere it said '12' should say '10' and anywhere that said '16' should say '48'. Steve noted those changes were [happening] in the findings as well so staff would look for those.

Public comment opened: None offered. *Public comment closed.*

Motion made by Frank Mutch, and seconded by Don Patterson, to approve the variance with the changes discussed and the staff report, findings and conditions and so forth, and subject to the findings, terms and conditions as modified. Motion carried, all in favor.

MATT DENSITY VARIANCE (4:35 pm)

Robert Costa presented the staff report. (See attachments to minutes in the May 2016 meeting file for staff report.) He noted that public comments which arrived after the staff report was done had been handed out to the Board. These were in opposition. (See attachments to minutes in the May 2016 meeting file for handouts.)

Robert confirmed for Steve that the Board wasn't considering the lifting of the agricultural exemption. They were deciding whether or not it was appropriate to have a residential use lot of this size. Steve noted that the Density Map and Regulations (DMR) didn't prescribe use. Each lot could have a dwelling or unit as long as there wasn't an agricultural restriction. When they looked at attachment 1 and the surrounding lots, did any of the six 20-acre parcels to the north and one to the south or the 80-acre parcels to the east and west have residential homes? Robert couldn't say for sure but he would guess yes. The largest lot size, which was 160 acres, was undeveloped. There might be homes closer to Red Horn Road [on the 80-acre parcels] but he was hesitant to answer without looking at the aerial imagery. Both Jack Duffey, agent for the project, and Gary Clark, the potential future landowner, were present and might be better able to speak to what was out there. Steve asked if MDEQ and subdivision review would have been required if the owners asked to lift the agricultural restriction in 2005 prior to the DMR. Robert replied yes. The only change was the [zoning/DRM] became applicable.

Robert offered further clarifications in response to questions from Frank and Steve. The Board was considering approval of a variance from the DMR that would allow a lot to proceed through to subdivision review. The Commissioners still made the final decision in the end as to whether or not this was an appropriate proposal. The Board would be saying if it was okay to have a residence on less than 20 acres. As a minor subdivision, this would go directly to the Commissioners to decide about lifting the agricultural restriction. It would not go to the Planning Board. It would not be considered sufficient to go to the Commissioners without the variance for lot size.

Don checked if the comments received didn't apply to the Board because [the Board] didn't make it a non-agricultural area. Robert clarified that this would start on the process to that. It should be part of the Board's consideration. It would apply. It was up to the Board members to decide whether it impacted the findings that they would make in association in approving a variance if that was what they decided to do.

Frank said that Robert stated this was similar to what was going on in this neighborhood. There were 3 people in the neighborhood saying that it was not. How did they resolve that? Robert replied he hadn't had time to see where the letters came from. He thought the authors might be in attendance and would have comments on that. Frank thought that

the DMR said it wasn't zoning. Robert clarified that it was identified as zoning. LaDana explained it specifically said it was zoning and was adopted under the zoning laws.

Jack Duffey, the agent for the proposal, introduced Gary Clark, the prospective buyer of the property. Jack outlined some history of the application. The property size was close to the 20 acres plus or minus 10%. The people to the north had commented. They had two 20-acre parcels, both of which were developed with single-family homes. The gentleman to the west had commented. It was not developed yet. He ran cattle on a larger piece. This parcel wasn't prime agricultural land. Jack's understanding was that it had historically been pasture and somewhat neglected for the past few years. [The owner] did have the irrigation ditch running through it and providing easements. One of the letters expressed some concerns regarding that. They weren't changing anything regarding that. It was an FIIP [Flathead Indian Irrigation Project] ditch so they had the maintenance and access. He agreed with the staff findings in the report and offered to answer questions.

Steve asked about the 2.2-acre lot on the corner. Attachment 3 didn't show a residence. He verified with Jack that there was one there and asked, referring to attachment 1, if the 20-acre parcel to the south had a residence. Gary Clark replied it was Tribal and did have a home. Steve noticed the 80-acre parcel to the west had a little corner cut out and confirmed with Gary that the little corner had a home. He asked if the big part of that 80 had an agricultural restriction. Gary said he'd be guessing. Jack knew cattle were run on it. Gary said the 80 to the east did have a home on it. Steve concluded the surrounding lots each had a home.

Public comment opened:
David Passieri of Mission Valley Properties said in his opinion, a residential use was the highest and best use. It would be good for county taxation. There was a defining canal that created the parcel to the back west edge of the original 20, forming a natural divide. An easement went back to service that home. It was set close to the boundary of the 17-acre parcel. A residence would not impede views and would make it more productive and nice. It was more of a field of weeds and wasn't receiving irrigation.

Kathryn Green owned property directly south of the subject property, one 20 over. She had two 20-acre lots. The problem with the irrigation was the ditch didn't have enough water. If they allowed the water to go through the Morigeaus to go down to this piece of property, it would deplete everything they were trying to irrigate because that ditch was so incredibly big. They were already at odds with each other due to the lack of water. It was a huge issue. The water just wasn't there. Frank asked Gary for comments, who thought that was an issue to take up with the Flathead Irrigation Board, who supplied the water to that ditch. He didn't know that it was applicable to this consideration.

Kathryn said another issue was Watson Road. In 1997 when she moved here, she researched things so when she bought her property, she was assured that because of these restrictive 20's, she wouldn't have to be in a room like this again but here she was. Because of what they grew and the animals they had, the road [with] the dust and the

density of people on it was becoming miserable. Gary said he wanted the same thing she wanted. Kathryn said [the subject parcel] was originally 20 acres. Someone in the past decided to subdivide it and sell off 3 acres without much forethought of what they were going to do with the remaining 17 acres. They didn't have a problem with it getting sold. They would just like it to be agricultural, which is what the whole area was.

Terry Carns was a neighboring rancher with 40 acres to the north. In addition to the extra dust and extra traffic, which were very detrimental to their animals, they were worried that if this precedent was set to subdivide agricultural land to less than 20 acres, the ball would start rolling and the ag land would disappear. This was very concerning. If this was allowed, did that mean everybody could come in and do this or was it just specific to this one parcel? Frank said each decision by the Board was specific to each application. Terry remarked it impacted them greatly with their livestock and their crops. Merle confirmed with Terry that there were structures on her property and she lived in one of them.

Dave P said everybody had property rights and the irrigation was being paid for the subject property. A poor design from the irrigation project was a poor design. As far as the design and delivery, that needed to be resolved with the Bureau of Indian Affairs, who handled the project water. [The subject parcel] was supposed to receive the water and it was being paid for on the tax bill. With regard to zoning and the regulations, he thought somebody could do a family transfer. He wasn't sure how an agricultural restriction worked. There were ways to get around it. He didn't believe the county regulations were to be used for land use decisions. He thought that the water not being delivered properly was a problem. His opinion was that shouldn't be part of the decision.

Steve asked about the direction and movement of water flow in the ditch. Someone answered to the northwest. Gary said it hadn't been turned out yet. Historically he couldn't speak to that. Steve confirmed with Kathryn that water moved through the ditch last summer. Steve asked Gary if he would change the use of the water if he bought the property. He would have the right to take some of that water. Steve checked that Kathryn's concern was that adding someone to take water would limit her water use. Kathryn gave more detail on the irrigation concerns and challenges in the area. Frank said they were sympathetic to this but this Board had no jurisdiction and had nothing to do with this issue on water. He understood it was a concern. It was a general issue and a sensitive one.

Wally Congdon, County Attorney and rancher, said the Board had one thing for jurisdiction. If they did a variance, they could put a condition that for pump irrigation water, they, like the other users on the ditch, needed to comply with state law and measure. That was state law. You had to measure it. The problem was nobody stepped up and enforced the rules. He talked more about this. He also talked about the historical situation with irrigation versus the situation now with smaller parcels. Besides saying measure it, the other thing to say where possible was to schedule the water use. They could make that a condition of the variance. It was a reasonable thing to do. You would accomplish what the state law said now on subdivision, which was there had to be a plan

for water use in ditches in subdivisions. He gave more details on where this came from, involving a very large ditch that was 8 miles long where the number of users had gone from the original 5 to 239. Those two conditions solved their problem and set the situation up for a way to make it work. If you knew the pressure and the number of sprinkler heads, you would know how much water you used. If you measured and rotated and did it right, the condition on the variance gave you horsepower to work with those who weren't being fair on the whole deal. Frank asked what good it did to restrict this applicant when the other people weren't restricted. Wally said the good [inaudible] was you acknowledged the law and then they had a better reason to tell the district court to make the condition.

Robert said if they were going to add conditions, they needed to consider the limited scope of the DMR. The DMR didn't' dictate uses or anything about irrigation. Also this project had not gone through the subdivision review process. This was just a step toward it. These kinds of conditions were important ones that he would recommend considering as part of the subdivision review. He thought the concerns raised were important but they didn't relate to the DMR. They did relate to irrigation use as part of the overall subdivision.

LaDana pointed out that if Gary Clark bought the property now, he could still irrigate the property. It was no different if he put a house on it. Wally agreed. LaDana continued that what they were looking at was strictly density. They weren't looking at the irrigation usage, which he could do with or without the house. Wally said that it was an agriculture use and it was going to irrigate. An irrigation water right and stock claim was not a domestic claim. It wasn't industrial. He couldn't use it for a tire factory or steam for electricity, for instance. He was limited to stock and irrigation for the water. If the issue was how to solve the problem, that was what he'd outlined.

Frank confirmed with Robert that the appropriate place to put this condition was in the subdivision review. Robert hoped that the people with the concerns would make those same comments when they got the opportunity for the formal subdivision review process. He encouraged them to do so. The Commissioners were the ones that approved the final subdivision and they should know this too.

Kathryn said [another woman] had some other questions regarding cows and noise. Steve asked if both the 2.28-acre parcel and the 17.8-acre piece on attachment 3 were currently owned by the same people, in which case a boundary line adjustment might offer an easy solution. The answer from the group was they no longer were. Robert said it would be an option if they could agree on that.

Frank checked that there would be one additional residence in this neighborhood if this was approved. In terms of impacts mentioned, how did you measure the impacts of more dust and so forth? His opinion was that one additional residence was not a significant addition, plus the neighbors were living on acreage with their own residences. He had a problem with equity and fairness. He mentioned the Planning Board was currently

considering a Right to Farm policy. That policy said you had the right to create a disturbance for agricultural activities, which protected those with ag activities.

Kathryn said to her, it was [an issue of] fairness too. When she bought to the south, she was told this was going to be what it was. Now it suddenly was not. Jack asked if Kathryn Green was adjacent to the south. Kathryn said she was to the south. There was a 20-acre parcel between Matt, Morigeau and then her. She also used Morigeau property for pasture through lease.

Terry touched on their concern. To them, one more residence was a big deal. One car, two cars, one truck, three trucks: it was more traffic coming down the gravel road, more dust, more irritant to the people across from her and across from this property that grew hay. It affected their animals and it affected them. To give an example, they were moving cattle down the road. Some yahoo in a SUV came barreling down. The person at the head of the cattle flagged him down and said to slow down. Not using the driver's language, he essentially said this was public land and he'd do what he wanted to do. This was what they were concerned about. These weren't agricultural people and they didn't understand that they put [the agricultural people's] lives at risk, as well as their animals and their equipment. It was hard for them to move their haying equipment around. It was just a hazard and they didn't want residential any more than what was there. They wanted to keep it agricultural land. They were afraid this would set a precedent.

David P said it was true what she was saying. Cows had the right of way, equipment maybe not so much. For the dust issue, lots of people were going with the chip sealing and having to participate in the chip sealing. Many times the larger agricultural owners didn't want or didn't have the ability to afford the initial upfront cost. With the chip sealing, the dust was gone. There were usually open lands that didn't allow that majority to take place to chip seal.

Terry countered that chip sealing also increased the speed at which people traveled. You had animals, kids, dogs, horses and cows on Watson Road with people coming in with teenagers, drinking and beer bottles. At 5:30 or 6 pm if you were to sit on Watson Road, you would see the whole area with dust, laying in the little crevasses. When she went to bale her hay, it was on the crop and in the bales and the horses coughed. It was an ongoing mess. It was unhealthy for animals and for people. She didn't know that she could afford to chip seal. It wasn't for suburbia. It was rural, agricultural land that they all had. She described her neighbor's sheep who were breathing this in. It was impossible to escape. They were concerned that if they allowed this once, it would keep happening every time somebody needed money. It was hard as it was, especially when you had people who liked to use a little more water than they needed to because they had more land but they ran their pipes a little longer and pulled boards. It was pretty miserable for the Little Guys (including her).

Public comment closed.

Wally said the Planning Board discussed that on a variance of this [size], it was probably not unreasonable to require a condition of a waiver of RSID protest on the question of chip seal or improving the road. LaDana noted that would come up in the subdivision review. It was a typical. Robert reiterated this was only a density variance applying to the lot density so that would come down to the subdivision. The conditions about accepting that this was in an agricultural area and those sorts of impacts to be prevented were conditions to typically go to subdivision approval and the Commissioners.

Steve thought they had to understand the reality that the position taken here was whether or not it was okay to have a lot that was 17.8 acres in a 20-acre density area. They also had to understand the fact that this lot existed prior to this being zoning for 20 acres, which made it hard for him to say they couldn't have a lot of this size. Other lots were much smaller. A lot of the issues brought up today needed to be resolved during the subdivision review and the lifting of the agricultural restriction rather than whether or not this lot should be allowed to continue to exist at 17.8 acres. He didn't feel they were in a position to solve the dust, irrigation and ag use issues at the Board of Adjustment. They had to decide whether having a lot of this size, which existed prior to the DMR, was okay or not.

Kathryn said she bought in 1997 and there were 20 acre restrictions. She didn't understand that. LaDana said that unfortunately there were not 20 acre restrictions. The DMR became effective in Oct. 2005. Prior to that, there was a 20-acre density policy that was written into the general plan. There was no real document. The DMR came about because the County was getting sued over this type of development and not having an actual regulation. That was why the County now had those regulations. Back then, there was more of a policy and a guideline, not a regulation. Steve said properties that were currently 40 acres or more in the area of the subject property could be subdivided down to 20 acres right now. People would meet the regulations. If they didn't have agricultural restrictions that had to be lifted, there could be a home on every one of those. It was really difficult to expect the number of residents in this vicinity to remain the same. That might not be very realistic.

LaDana said to tie into that, she saw a lot of family transfers to avoid subdivision review. They transferred to a family member, kept it a few years, then sold it. They were getting these parcels that they didn't want to see out there. That was really the issue. Robert added family transfer lots were not required to comply with the DMR. LaDana said those weren't required to comply with subdivision rules. Gary Clark was taking it through the process to get a variance approval and trying to do the right thing whereas other tried to avoid review entirely. Steve thought this process gave an opportunity to voice concerns to the Commissioners when they considered lifting this agricultural restriction. [People] had an opportunity to suggest that they put some conditions on this to remind the future owners of their responsibilities with the irrigation rules and laws, to reduce dust if that opportunity arose, and those kinds of things. They needed to follow through on those opportunities that they might have. This Board wasn't changing the density or the size of the lot. They were just deciding whether or not to let the Commissioners decide to lift the ag restriction or not. Frank asked if the Board wasn't making a decision on land use in

this process, what were they doing. Robert replied they were approving the lot size. In the conditions it tied the lot to the residence to be developed. He clarified that Frank was asking about use. The applicant wanted to develop the lot with a residence; that was the applicant's proposal. Steve added that was for the Commissioners to decide. Frank thought these were small farms in this area and not the agricultural type of place that people might envision Montana to be. He thought the variance was reasonable.

Don asked if there were helpful comments the Board could add. Robert said it depended on whether or not the Board liked the suggested findings, which began on pg. 10. Those would recommend approval.

Motion made by Merle Parise, and seconded by Frank Mutch, to approve the variance with staff recommendation for approval with the findings of fact and conditions. Motion carried, all in favor.

<u>OTHER BUSINESS</u> (5:23 pm)
Frank repeated his opposition to the DMR and wanted to discuss it. LaDana observed and pointed out the Board members' reactions. The Board did not seem to want this and she asked the Board what they would like. Discussion followed about more appropriate approaches for Frank, such as taking this as a private citizen to the Commissioners or maybe the Planning Board. Board members expressed they wanted to have a chance to review and think about information prior to discussion, as with agenda items.

LaDana said it would be better as a private citizen. When you were on the Board, you were representing the County, not personal views. Robert noted the Board members represented Lake County and were appointed to serve on this Board. It wasn't that staff didn't value their opinions. In the same way, the staff had their own personal opinions about stuff that they did.

Wally referred to the discussion tonight. Right to Farm did matter and needed to be in the priorities list. One lady [who commented] had left Frenchtown because the neighbors thought that baling hay was a nuisance and made dust, and cows stank. The whole issue of Right to Farm was why they had people here [tonight]. He told both [women who offered comments of concern] to get a draft [of Right to Farm] and have the discussion with the Planning Board and the Commissioners.

Robert announced he was moving on after 5 years. It had to do with what people wanted and were they being listened to. LaDana announced that Friday was her last day. It had been a pleasure to work with the Board members. There were some things in Lake County that couldn't be fixed. They'd tried to get through a lot of things and didn't seem to get anywhere. Board members and public thanked LaDana and Robert for great jobs. They would be missed.

Don asked if the Board could do something. Wally gave two quotes. Oliver Wendell Holmes said, "The issues about which we talk are issues where reasonable men of reasonable educations and reasonable decisions can decide and reasonably disagree."

That was how Holmes explained how the Supreme Court worked. It was a true statement. He also referred to a book by James Pete Owens (head of New York Stock Exchange for years) with 10 simple rules called cowboy ethics. The seventh rule was 'ride for the brand'. Just because someone else disagreed, it didn't mean you shot the messenger if you didn't like the message. If that's what you did, you weren't riding for the brand. You needed to remember that some things were not for sale. You couldn't buy either one, and to him, that was what mattered the most.

Frank Mutch, acting chair, adjourned the meeting at 5:45 pm.